No. 10-778

In the Supreme Court of the United States

BINYAM MOHAMED, ET AL., PETITIONERS

v.

JEPPESEN DATAPLAN, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the government's assertion of the state-secrets privilege required that this case be dismissed at the pleading stage.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 21a-93a) is reported at 614 F.3d 1070. The amended opinion of the initial panel of the court of appeals is reported at 579 F.3d 943. The opinion of the district court (Pet. App. 1a-20a) is reported at 539 F. Supp. 2d 1128.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2010. The petition for a writ of certiorari was filed on December 7, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are five foreign nationals who allege that they experienced "forced disappearance, torture, and inhumane treatment" inflicted by "agents of the

United States and other governments" as part of the United States' terrorist detention and interrogation program. C.A. E.R. 753. Petitioners brought this action for money damages under the Alien Tort Statute, 28 U.S.C. 1350, against respondent Jeppesen Dataplan, Inc. (Jeppesen), a private corporation that provides customers with flight and logistical support services. Pet. App. 30a-31a; C.A. E.R. 759-760, 818-822.

Petitioners base their claims on their contention that Jeppesen "furnished essential flight and logistical support to aircraft used by the [Central Intelligence Agency (CIA)] to transfer terror suspects to secret detention and interrogation facilities" in foreign countries. C.A. E.R. 756. Petitioners' theories of liability rest on multiple, alternative factual allegations regarding Jeppesen's purported role in and knowledge of petitioners' alleged "forced disappearance" and "torture and other cruel, inhuman or degrading treatment": (1) Jeppesen "actively participat[ed]" in petitioners' forced disappearance; (2) Jeppesen "conspir[ed]" with and/or "aid[ed] and abett[ed]" agents of the United States in petitioners' forced disappearance and torture or mistreatment; and (3) Jeppesen acted in "reckless disregard" about whether petitioners would be subjected to forced disappearance or torture or mistreatment by providing flight and logistical support to aircraft and crew that Jeppesen "knew or reasonably should have known" would transport petitioners for secret detention and interrogation. Pet. App. 31a-32a (quoting complaint).

Before Jeppesen filed its answer to petitioners' complaint, the United States intervened, asserted the state-secrets privilege, and moved to dismiss the action. Pet. App. 9a, 11a.

Then-CIA Director Michael Hayden asserted the state-secrets privilege in a public declaration. C.A. E.R. 733-750. Director Hayden explained in that declaration that, although the government had publicly acknowledged the general existence of the CIA terrorist detention and interrogation program, petitioners' allegations could be neither confirmed nor denied without revealing "intelligence sources and methods." *Id.* at 747; see *id.* at 737-738. The Director described specific categories of information the disclosure of which "reasonably could be expected to cause serious—and, in some instances, exceptionally grave—damage to the national security." *Id.* at 745-746. Those categories cover (1) information that would "tend to confirm or deny whether Jeppesen or any other private entity assisted the CIA with any alleged clandestine intelligence activities"; (2) information that would "tend to confirm or deny any alleged cooperation between the CIA and foreign governments regarding clandestine intelligence activities"; (3) information about "the scope and operation of the CIA terrorist detention and interrogation program"; and (4) "[a]ny other information concerning CIA clandestine intelligence activities that would tend to reveal any intelligence activities, sources, or methods." *Id.* at 746; see *id.* at 746-748. Director Hayden concluded that the "highly classified information" subject to the privilege assertion is so "central to the allegations and issues in this case" that "any further litigation * * * would pose an unacceptable risk of disclos[ing]" state secrets. *Id.* at 749.

Director Hayden further explained the basis for the government's assertion of the state-secrets privilege in a classified declaration that the government submitted for the district court's ex parte, in camera review. Pet. App. 9a, 11a-13a, 42a. The district court (and, later, the

court of appeals) reviewed ex parte and in camera the government's classified submissions. *Id.* at 9a, 51a n.6, 56a-57a.

2. The district court dismissed the action. Pet. App. 9a-19a. The court concluded that Director Hayden's public declaration satisfied the procedural requirements for invoking the state-secrets privilege and that the information that the Director identified "is properly the subject of [the] state secrets privilege." *Id.* at 12a-14a. Based on its "review of [Director] Hayden's public and classified declarations," the district court also determined that petitioners' "'allegations' of covert U.S. military or CIA operations in foreign countries against foreign nationals" lie "at the core of" their case against Jeppesen and that those allegations "clearly [involve] a subject matter which is a state secret." *Id.* at 16a, 18a. The court ultimately concluded that "no protective procedure can salvage this case" and that proceeding further in the litigation "would jeopardize national security." *Id.* at 16a-17a.

3. A panel of the Ninth Circuit initially reversed. 579 F.3d 943 (9th Cir. 2009) (amended opinion). The panel did not dispute the district court's conclusion that allowing this case to proceed further would jeopardize national security. The panel instead concluded that state-secrets jurisprudence permits a court to dismiss a case at the pleading stage only if the plaintiff's claims are "predicated on the existence and content of a secret agreement between a plaintiff and the government." *Id.* at 952-953, 956-957. Outside that narrow context, the panel concluded, the state-secrets privilege cannot "foreclos[e] litigation altogether at the outset" because the state-secrets privilege is "like any other evidentiary privilege" and does not apply at the pleading stage,

where the relevant focus is on "the sufficiency of the *complaint*," not questions of evidence. *Id.* at 955, 957, 961. Noting that "Jeppesen has not filed an answer" to respond to petitioners' factual allegations and that "discovery has not yet begun" to probe for evidence, the panel held that dismissal was premature because the state-secrets privilege, in the panel's view, can never apply before "an actual request for discovery of specific evidence." *Id.* at 960-961.

In June 2009, the Solicitor General authorized the filing of a petition for en banc rehearing. The government's rehearing petition explained that, while this case was on appeal, Director Hayden's state-secrets assertion was subject to a "careful and deliberative" review "at the highest levels of the Department of Justice." C.A. Reh'g Pet. 1-2. The government emphasized that it had considered "all possible alternatives to relying upon the state secrets privilege" and again confirmed that "permitting this suit to proceed would pose an unacceptable risk to national security." *Ibid.*; see Pet. App. 34a, 43a, 67a (discussing that further review).

4. The court of appeals granted rehearing en banc, 586 F.3d 1108 (9th Cir. 2009), and the en banc court affirmed the district court's judgment of dismissal. Pet. App. 21a-93a.

The court of appeals stated that "every effort should be made to parse claims to salvage a case" from dismissal when the government asserts the state-secrets privilege, and it explained that it had "carefully and skeptically reviewed the government's classified submissions" in this case. Pet. App. 58a, 72a. But like the district court, the en banc court held, based on its review of those submissions, that "there is no feasible way to litigate Jeppesen's alleged liability *without creating an*

unjustifiable risk of divulging state secrets." *Id.* at 59a-60a. The court concluded that "significant harm" to the national security (*id.* at 58a) "would result from further litigation" because "the claims and possible defenses [in this case] are so infused with state secrets that the risk of disclosing them is both apparent and inevitable." *Id.* at 64a-65a; see *id.* at 57a, 63a. The court accordingly affirmed the district court's "[d]ismissal at the pleading stage." *Id.* at 60a, 64a.

The en banc court rejected the panel's view that state-secrets jurisprudence precludes dismissal. It reasoned that two procedural expressions of the state-secrets doctrine—commonly known as the "*Totten* bar" and the "*Reynolds* privilege"—both reflect a principle "long recognized" by this Court: "[I]n exceptional circumstances courts must act in the interest of the country's national security to prevent disclosure of state secrets, even to the point of dismissing a case entirely." Pet. App. 35a (citing *Totten* v. *United States*, 92 U.S. (2 Otto) 105 (1876), and *United States* v. *Reynolds*, 345 U.S. 1 (1953)).

In the *Totten*-bar context, the court of appeals explained, a court must dismiss a case at the outset—without "a formal assertion of the state secrets privilege by the government"—if it is apparent from the nature of the suit itself that "'the very subject matter of the action' is 'a matter of state secret.'" Pet. App. 37a-38a & n.4, 51a-52a (citation omitted); see *id.* at 36a-39a. The court recognized that the *Totten* bar might well preclude litigation of petitioners' claims, *id.* at 51a-54a, but de-

clined to resolve that question because it concluded that the *Reynolds* privilege warranted dismissal. *Id.* at 54a.[1]

The court explained that the relevant analysis in the *Reynolds*-privilege context is guided not only by the nature of the underlying litigation but also by the formal assertion of the state-secrets privilege by the head of the government department with control over the matter. Pet. App. 42a; see *id.* at 39a-50a. The government's privilege assertion should provide "sufficient detail" for the court to evaluate the "scope" of the information protected by the privilege. *Id.* at 42a. And when the "nature of the allegations and the government's declarations" together allow the court to determine "that litigation must be limited or cut off in order to protect state secrets," the court of appeals reasoned that a pleading-stage dismissal is justified in "rare case[s]" in order to "protect state secrets" from disclosure. *Id.* at 44a-45a, 72a; see *id.* at 40a, 47a-50a. The court cited authority from numerous courts of appeals showing that the state-secrets privilege may be asserted "at the pleading stage," *id.* at 43a-44a; noted that it may be "especially

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[1] The court of appeals explained that the *Totten* bar applies "when it is 'obvious' without conducting the detailed analysis required by *Reynolds*" that a plaintiff's claims themselves are premised on state secrets. Pet. App. 52a (citation omitted); see *id.* at 37a-38a. The court reasoned that petitioners' claims that "Jeppesen conspired with [government] agents" "*might well fall within the Totten* bar," because those claims, like those in *Totten* and *Tenet* v. *Doe*, 544 U.S. 1 (2005), are premised on the alleged existence of a secret agreement with the government. Pet. App. 52a-53a & n.7. The court stated, however, that petitioners' separate claim based on "what [Jeppesen] 'should have known' about the alleged unlawful extraordinary rendition program" raised a more "difficult question" because it was "not so obviously tied to proof of a secret agreement between Jeppesen and the government." *Id.* at 53a-54a.

difficult" for the government to make the necessary showing to warrant a pleading-stage dismissal; but concluded that "foreclosing the government from even trying to make that showing would be inconsistent with the need to protect state secrets." *Id.* at 45a.

This suit, the court of appeals held, presents one of the "rare occasions" in which a pleading-stage dismissal is appropriate. Pet. App. 24a-25a, 55a-67a, 72a-73a. The court explained that the Judiciary must critically and carefully review assertions of the state-secrets privilege and that, in this case, it had conducted "a searching judicial review" with a degree of "skepticism" appropriate for petitioners' allegations of "serious government wrongdoing." *Id.* at 46a, 54a & n.8. Having conducted that review, the court emphasized its "independent conclusion" that "the government is not invoking the privilege to avoid embarrassment or to escape scrutiny of its recent controversial transfer and interrogation policies, rather than to protect legitimate national security concerns." *Id.* at 67a.

The court stated that it "rel[ied] heavily" on the government's classified submissions, that the information therein was "crucial to [its] decision," Pet. App. 51a n.6, 58a-59a, and that "every judge who has reviewed the government's formal, classified claim of privilege" has agreed that "the claim of privilege is proper" because the "compelled or inadvertent disclosure of [protected] information in the course of litigation would seriously harm legitimate national security interests." *Id.* at 56a-57a. The court explained that its ability to explain publicly the full rationale for its decision was subject to "considerable constraints" and that it would therefore discuss its conclusions "so far as possible" "without com-

promising the secrets" that the privilege protects. *Id.* at 51a, 55a; see *id.* at 57a, 65a.

First, the court of appeals concluded that "at least some of the matters [the government] seeks to protect from disclosure in this litigation are valid state secrets," the disclosure of which would significantly damage national security. Pet. App. 56a-57a. The court noted the categories of privileged information in Director Hayden's public declaration, but stated that it could not publicly "explain[] precisely which matters the privilege covers lest [it] jeopardize the secrets" at issue. *Ibid.*

Second, the court of appeals concluded that the government's valid privilege assertion required dismissal. Pet. App. 58a-60a. The court expressed doubt that petitioners could establish a prima facie case on any of their claims without information protected by the state-secrets privilege, *id.* at 59a n.11, 65a, but it assumed *arguendo* that petitioners' "prima facie case and Jeppesen's defenses may not inevitably depend on privileged evidence." *Id.* at 59a-60a. On that assumption, the court concluded that allowing this litigation to proceed would create "*an unjustifiable risk of divulging state secrets.*" *Id.* at 60a. Every one of petitioners' claims, the court explained, "describe Jeppesen as providing logistical support in a broad, complex process, certain aspects of which * * * are absolutely protected by the state secrets privilege." *Id.* at 61a. Thus, although the government had made public some general information about the terrorist detention and interrogation program, the court concluded that "Jeppesen's alleged role and its attendant liability cannot be isolated from aspects that are secret and protected" because "the facts underlying [petitioners'] claims are so infused with these secrets." *Ibid.* The court reasoned that "*any* plausible effort by

Jeppesen to defend against [those claims] would create an unjustifiable risk of revealing state secrets": "[N]o matter what legal or factual theories" Jeppesen might present in its defense, "there is precious little Jeppesen could say about its relevant conduct and knowledge without revealing information about how the United States government does *or does not* conduct covert operations." *Id.* at 61a-63a.

The en banc court also agreed with the district court that no "protective procedures" could protect national security if the litigation were to proceed. Pet. App. 63a-64a. The "relevant secrets" in this case, it explained, "are difficult or impossible to isolate." *Id.* at 63a. "[E]ven efforts to define a boundary between privileged and unprivileged evidence would risk disclosure by implication." *Ibid.* And although the court stated that it could not "explain[] precisely why this case cannot be litigated without risking disclosure of state secrets," it emphasized that it was "convinced" that significant damage to national security "would result from further litigation." *Id.* at 65a; see *id.* at 58a.

The dissenting judges, in an opinion authored by Judge Hawkins, would have adhered to the views expressed in the initial panel decision. Pet. App. 74a-93a. They concluded that the state-secrets privilege recognized in *Reynolds* cannot be asserted before discovery, and can never be a basis for a pleading-stage dismissal. *Id.* at 84a, 88a n.13, 90a, 92a.

ARGUMENT

The court of appeals reviewed the highly classified materials supporting the invocation of state-secrets privilege in this case and held that the privilege requires that the action be dismissed. In so holding, the court of

appeals correctly applied established legal principles. Its decision does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. a. The basic legal principles governing this case are well established. From the earliest days of the Republic, courts have recognized the need to protect information critical to national security. See *United States* v. *Burr*, 25 F. Cas. 30, 37 (C.C. Va. 1807) (No. 14,692d); *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 31 (1827). This Court's first two detailed discussions of the state-secrets doctrine—*Totten* v. *United States*, 92 U.S. (2 Otto) 105, 107 (1875), and *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953)—recognize the importance of the doctrine to the protection of national security, an interest this Court has repeatedly deemed "compelling." *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988); see *Haig* v. *Agee*, 453 U.S. 280, 307 (1981). The responsibility to protect national-security information "falls on the President as head of the Executive Branch and as Commander in Chief." *Egan*, 484 U.S. at 527. The state-secrets doctrine is itself deeply rooted in "the law of evidence," *Reynolds*, 345 U.S. at 6-7, and reflects the Executive's constitutional duty to protect "military or diplomatic secrets," *United States* v. *Nixon*, 418 U.S. 683, 710-711 (1974); see *El-Masri* v. *United States*, 479 F.3d 296, 303 (4th Cir.), cert. denied, 552 U.S. 947 (2007); *Ellsberg* v. *Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983) (explaining that the privilege prevents harm to the Nation's defense, "intelligence-gathering methods or capabilities," and "diplomatic relations"), cert. denied, 465 U.S. 1038 (1984).

The state-secrets doctrine rests on the commonsense principle that "public policy forbids the mainte-

nance of any suit in a court of justice" that would disclose "matters which the law itself regards as confidential." *Weinberger* v. *Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146-147 (1981) (*Catholic Action*) (quoting *Totten*, 92 U.S. at 107, and citing *Reynolds*, *supra*); see *Reynolds*, 345 U.S. at 10-11. Two procedural expressions of the doctrine—the *Totten* bar and the *Reynolds* privilege—illustrate that the doctrine covers a continuum of analysis whose motivating force is the requirement that the judicial process not jeopardize national security. See *id.* at 11 & n.26.

In some circumstances, as in *Totten*, courts must dismiss an action—even *without* the procedural step of a formal, governmental assertion of the state-secrets privilege—because the likelihood of harm to the national security resulting from further litigation will be apparent from the nature of the underlying claims by themselves. This Court in *Tenet* v. *Doe*, 544 U.S. 1 (2005), thus held that a case is non-justiciable under the *Totten* bar if its allegations are premised on the existence of a secret espionage relationship with the government.[2] "[R]equiring the [g]overnment to invoke the privilege on a case-by-case basis" in that context would both "risk[] the perception that [the government] is either confirming or denying relationships with individual plaintiffs" and would expose the government to "graymail" by forcing it to choose between settling the case or bearing the

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[2] The Court in *Catholic Action* also applied the *Totten* bar to protect information regarding the location of nuclear weapons. 454 U.S. at 146-147. *Catholic Action* demonstrates that the litigation of civil claims that would damage national security lies "beyond judicial scrutiny," *id.* at 146, and that the state-secrets principles underlying *Totten* are not limited to clandestine espionage agreements with the government and protect national security more generally. Pet. App. 36a-37a.

risk that "any effort to litigate the action would reveal" state secrets. *Id.* at 11; see *id.* at 9-10 (discussing *Catholic Action*'s application of the *Totten* bar to a case that would have revealed whether the government proposed storing nuclear weapons at a military facility). *Totten* provides "absolute protection" from such harms, *id.* at 11, by requiring dismissal whenever it is "obvious that the action should never prevail over the privilege." *Id.* at 9 (quoting *Reynolds*, 345 U.S. at 11 n.26).

In other contexts, the litigation of claims may threaten national-security information that must be protected from disclosure, but the suit's allegations standing alone may not make that harm sufficiently apparent to a court. The government therefore may take the additional, procedural step[3] of asserting a "formal claim of privilege"—"lodged by the head of the department which has control over the matter, after actual personal consideration by that officer," *Reynolds*, 345 U.S. at 7-8—to demonstrate more fully to the court, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose * * * matters which, in the interest of national security, should not be divulged." *Id.* at 10. It is then the role of the court to "determine whether the circumstances are appropriate for the claim of privilege" after having considered "all the circumstances of the case," *id.* at 8, 10, and having given the Executive's invocation of the privilege the "utmost deference," *Nixon*, 418 U.S. at 710.

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[3] The government will sometimes simultaneously seek dismissal under the *Totten* bar and separately assert a formal *Reynolds* privilege to protect national security and provide the court with a more complete understanding of the harm from further litigation.

The Attorney General has promulgated policies governing future assertions of the state-secrets privilege. See Office of the Att'y Gen., U.S. Dep't of Justice, *Policies and Procedures Governing Invocation of the State Secrets Privilege* (Sept. 23, 2009), http://www.justice.gov/opa/documents/state-secret-privileges.pdf. Those policies provide, *inter alia*, that the Department will "seek to dismiss a litigant's claim or case on the basis of the state secrets privilege only when doing so is necessary to protect against the risk of significant harm to national security" and "will not defend an invocation of the privilege in order to[] * * * conceal violations of the law" or "prevent embarrassment to a person, organization, or agency of the United States government." *Id.* § 1; see also *id.* §§ 2-4 (specifying process of internal review and requiring Attorney General's approval to defend assertion of the privilege); cf. Pet. App. 43a ("Although *Reynolds* does not require review and approval by the Attorney General when a different agency head has control of the matter, such additional review by the executive branch's chief lawyer is appropriate and to be encouraged."). Although that policy does not, by its terms, apply retroactively to this case, "[t]he government certified both in its briefs and at oral argument before the en banc court that officials at the 'highest levels of the Department of Justice' of the new administration had reviewed the assertion of privilege in this case and determined that it was appropriate" under the substantive standards in the policy. *Id.* at 34a; cf. *id.* at 42a-43a, 67a.

b. When the government has appropriately invoked the state-secrets privilege, it is absolute: "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military se-

crets are at stake." *Reynolds*, 345 U.S. at 11. A court therefore must not "forc[e] a disclosure of the very thing" protected by the privilege or otherwise "jeopardize the security which the privilege is meant to protect" while adjudicating the case. *Id.* at 8, 10. The privileged evidence is removed altogether from the litigation, and the court must consider whether litigation can proceed without that information. See *id.* at 10-11.

As the court of appeals explained, the state-secrets privilege may be asserted at any time and, in some cases, will warrant dismissal at the pleading stage. The courts of appeals have long held that dismissal is warranted (1) where a plaintiff cannot establish a prima facie case on his claim with non-privileged evidence; (2) where the privilege assertion would deny a defendant a valid defense; and (3) where, as here, further litigation would "present an unacceptable risk of disclosing state secrets" because the "nonprivileged information that will be necessary to the claims or defenses" is inseparable from the privileged evidence, Pet. App. 48a-49a; see *id.* at 48a-50a, 62a-63a (citing court of appeals decisions). The court of appeals correctly recognized that where a court can determine at the outset of a case from the nature of the allegations and the government's privilege claim "that litigation must be limited or cut off in order to protect state secrets," it would be "both unnecessary and potentially dangerous" to wait until specific evidentiary disputes arise to dismiss the action. *Id.* at 44a.

c. The court of appeals properly followed those established principles in affirming the district court's judgment after conducting its own independent review. Petitioners do not dispute that the government's privilege assertion complied with "*Reynolds*' procedural re-

quirements for invoking the state secrets privilege" or that the categories of information covered by the privilege claim involve military or state secrets. See Pet. App. 55a, 57a. Nor do petitioners appear to meaningfully call into question the court of appeals' fact-bound conclusion that this particular case could not proceed further without posing an "unjustifiable risk of divulging state secrets," *id.* at 60a (emphasis omitted).

As the en banc court explained, petitioners' claims are based on allegations that Jeppesen "provid[ed] logistical support in a broad, complex process, certain aspects of which" are protected by the state-secrets privilege. Pet. App. 61a. Because "Jeppesen's alleged role and its attendant liability cannot be isolated from aspects that are secret and protected," "*any* plausible effort by Jeppesen to defend" itself against petitioners' claims would pose an unwarranted risk of revealing secrets, "no matter what legal or factual theories Jeppesen would choose to advance." *Id.* at 61a, 63a. In other words, "[w]hether or not Jeppesen provided logistical support in connection with the extraordinary rendition and interrogation programs, there is precious little Jeppesen could say about its relevant conduct and knowledge without revealing information about how the United States government does *or does not* conduct covert operations." *Id.* at 63a. For those reasons, the en banc court explained, this case is one of the "exceptional" and "rare" suits in which "the relevant secrets are difficult or impossible to isolate," such that "efforts to define a boundary between privileged and unprivileged evidence" would itself "risk disclosure by implication." *Ibid.*

The court of appeals stated that its ability to explain fully the basis for its decision was limited given the clas-

sified nature of the information it found "crucial to [its] decision," Pet. App. 51a n.6. See *id.* at 55a, 57a, 65a. This public brief likewise cannot discuss the significance of the classified information further without "forcing a disclosure of the very thing the privilege is designed to protect." *Reynolds*, 345 U.S. at 8. Upon request, the government will make the classified submissions in this case available to the Justices of this Court under appropriate security measures. For present purposes, however, the key point is that the lower courts' application of settled legal principles to the classified facts of this case does not warrant further review.[4]

2. Petitioners argue (Pet. 23-33) that review is warranted because the courts of appeals have divided over "whether a case may properly be dismissed at the pleading stage," Pet. 24-25. Petitioners assert that a case may be dismissed based on an assertion of the state-secrets privilege only after "the pleading stage" is over, *i.e.*, after the plaintiff has "submit[ted] all non-privileged evidence" supporting his case and the court has determined that the exclusion of privileged information "renders it impossible for the plaintiff to put forth a prima facie case, or for the defendant to assert a valid defense." Pet. 28-29. Petitioners are incorrect.

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[4] This case does not concern the propriety of torture. Torture is illegal and the government has repudiated it in the strongest terms. Federal law makes it a criminal offense to engage in torture, to attempt to commit torture, or to conspire to commit torture outside the United States. See 18 U.S.C. 2340A; see also, *e.g.*, Exec. Order No. 13,491, § 3(a), 3 C.F.R. 200 (2010) (directing that individuals detained during armed conflict "shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture)").

a. Petitioners recognize that courts of appeals, like the court in this case, have found dismissal at the pleading stage appropriate where "state secrets would be so central to proving the parties' claims or defenses" that further litigation would inevitably risk disclosing state secrets. Pet. 26 (citing, *e.g.*, *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc)). Petitioners suggest, however, that the question has engendered a division of authority because (1) other courts of appeals that have (similarly) dismissed suits at the pleading stage have used a purportedly conflicting rationale, Pet. 25-26, and (2) some courts in particular cases have refused to dismiss suits at the pleading stage, Pet. 26-27. That suggestion is meritless.

Petitioners appear to base their assertion of a conflict among appellate decisions dismissing suits at the pleading stage on the view that the Ninth Circuit has indicated that the term "very subject matter" should be used to describe the *Totten*-bar rather than the *Reynolds*-privilege inquiry (Pet. App. 35a, 60a n.12), whereas decisions like the Fourth Circuit's decision in *El-Masri* have stated that dismissal is warranted if the government's *Reynolds*-privilege assertion shows that the "very subject matter" of the suit is a state secret. Pet. 25-26; see, *e.g.*, *El-Masri*, 479 F.3d at 308, 310 (stating that "the 'central facts' or 'very subject matter' of a civil proceeding * * * are those facts necessary to litigate it"; explaining that dismissal is warranted where "privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure"). That difference in nomenclature by courts reaching the same result does not reflect a division of authority warranting review. The Ninth Circuit has itself indicated that the *Totten* and *Reynolds*

inquiries "form a 'continuum of analysis'" in this context. Pet. App. 61a n.12 (citation omitted). And the court below affirmatively "rel[ied] on *El-Masri*" to support its holding, explaining that *El-Masri* "properly concluded—with respect to allegations comparable to those here"—that "the action could not be litigated 'without threatening the disclosure' of state secrets" because "'virtually any conceivable response to plaintiffs' allegations would disclose privileged information.'" *Ibid.* (quoting *El-Masri*, 479 F.3d at 308, 310) (brackets omitted). In any event, even if there were a terminological diversity among appellate decisions *dismissing* suits at the pleading stage, resolving any such disagreement would not offer support to petitioners' broader contention that the state-secrets privilege can never justify a pleading-stage dismissal.[5]

Petitioners cite three appellate decisions that did not dismiss actions at the pleading stage, Pet. 26-27, none of which supports petitioners' view that the *Reynolds* privilege can never justify a pleading-stage dismissal. The decisions simply illustrate that the allegations, facts, and scope of the privilege assertion in every state-secrets case will be different; that the government may assert the state-secrets privilege at various stages of litigation;

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[5] Petitioners indicate (Pet. 25) that the D.C. Circuit has not yet had "occasion to apply the 'very subject matter' ground" in a state-secrets-privilege case. Pet. 25-26 (quoting *In re Sealed Case*, 494 F.3d 139, 158 (D.C. Cir. 2007) (Brown, J., concurring and dissenting)); see *In re Sealed Case*, 494 F.3d at 152 (majority opinion) (concluding that the record did not support the view that the unprivileged facts were "so entwined with privileged matters, and the risk of disclosure of privileged material so unacceptably high, that the very subject matter of this action is a state secret") (citation omitted). At best, petitioners suggest the mere potential for a future conflict, not an existing division of authority warranting review.

and that the particular nature of each privilege assertion will affect whether the government seeks dismissal and whether dismissal will be warranted. Such fact-bound applications of well-developed state-secrets principles do not illustrate a conflict of authority.

The court in *In re United States*, 872 F.2d 472, 478-479 (D.C. Cir.), cert. dismissed, 493 U.S. 960 (1989), for instance, denied mandamus relief because it concluded, based on "the facts of the case," that "the litigation could proceed without jeopardizing national security" by employing "evidentiary control[s]" that would "amply accommodate the Government's concerns" and allow the district court "to 'disentangle' the sensitive from the nonsensitive information" at issue. In *Monarch Assurance P.L.C.* v. *United States*, 244 F.3d 1356, 1364-1365 (Fed. Cir. 2001) (per curiam), the court found summary judgment (not a pleading-stage dismissal) to be premature without additional discovery because the court reasoned that the government's privilege assertion was directed at "denying access to Government witnesses" and did not extend to the "discovery of non-government witnesses." And in *DTM Research, LLC* v. *AT&T Corp.*, 245 F.3d 327, 330, 333-334 (4th Cir. 2001), the court affirmed the denial of the defendant's summary-judgment motion where the government asserted the state-secrets privilege to quash the third-party subpoenas directed at the government and entities alleged to have worked with the government in producing certain technology. The government did not seek dismissal in *DTM Research*, and the court concluded that the case should proceed because the subpoenaed information was not central to the defense. *Id.* at 333-334. In so ruling, the Fourth Circuit recognized that dismissal would have been warranted if state secrets had been "so central to the sub-

ject matter of the litigation that any attempt to proceed w[ould have] threaten[ed] disclosure of the privileged matters," *id.* at 334 (citation omitted), thus illustrating the absence of any division of authority on the question presented. See *Sterling* v. *Tenet*, 416 F.3d 338, 348 (4th Cir. 2005) (quoting *DTM Research* and affirming a pleading-stage dismissal requested by the government), cert. denied, 546 U.S. 1093 (2006); see also *El-Masri*, 479 F.3d at 308 (following *Sterling*).

b. Petitioners contend (Pet. 29-33) that this case is an example of the lower courts' erroneous application of the state-secrets privilege because, petitioners argue, petitioners could have presented non-privileged information to establish a prima facie case on their claims. Among other things, petitioners note that a district court adjudicating a Guantanamo detainee's habeas corpus petition has made findings about factual allegations relating to petitioner Mohamed's alleged mistreatment based on his own testimony. Pet. 31-33 & n.8 (discussing *Mohammed* v. *Obama*, 704 F. Supp. 2d 1 (D.D.C. 2009)). But the court of appeals in this case *assumed* that petitioners might use such non-privileged evidence in establishing a prima facie case. Pet. App. 59a, 61a-62a. The court concluded that dismissal was nevertheless warranted because, based on its careful review of the classified submissions, it determined that any further litigation would unjustifiably risk the disclosure of state secrets and that no "protective procedures" could adequately protect the state secrets "infused" into the facts underlying petitioners' claims. *Id.* at 59a-64a; see pp. 5-6, 8-10, *supra*. Petitioners identify no decision that would require a different result. Indeed, no court has ever adopted the restrictive standard advocated by petitioners, which would always preclude a pleading-stage

dismissal based on a valid assertion of the state-secrets privilege, regardless of the danger to national security.

3. Petitioners contend (Pet. 19-23) that review is warranted because the question presented is one of national importance. Petitioners base that contention on (1) their view that applying the state-secrets privilege in litigation alleging grave executive misconduct risks abdicating judicial control to executive officers and (2) their assertion that the government "now routinely invokes the privilege" to dismiss actions at the pleading stage. Pet. 20-22. Those contentions are incorrect and, in any event, do not counsel in favor of review in this case.

This Court in *Reynolds* made clear that when the government asserts the state-secrets privilege, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." 345 U.S. at 8. The en banc court here understood well its obligation to "independent[ly] determin[e]" the propriety of the privilege assertion. Pet. App. 45a (quoting *Al-Haramain Islamic Found.* v. *Bush*, 507 F.3d 1190, 1202 (9th Cir. 2007)). Indeed, the court explained that its judgment was based on a "detailed" and "searching judicial review" under *Reynolds*, *id.* at 54a, 64a, 72a, which included the court's "careful[] and skeptical[]" examination of both the public and the classified submissions in this case. *Id.* at 51a n.6, 58a-59a. The court specifically noted that an appropriate dose of "skepticism" was warranted where "serious government wrongdoing" is alleged, *id.* at 54a n.8, and it expressly determined that the government properly invoked the privilege in this case "to protect legitimate national security concerns," not "to avoid embarrassment or to escape scrutiny of its recent controversial transfer and interrogation policies."

Id. at 67a. Nothing in the en banc court's careful and independent approach to the government's privilege assertion suggests a judicial abdication to the Executive Branch.[6]

Although petitioners contend (Pet. 21-22) that the Executive has asserted the state-secrets privilege to dismiss litigation more frequently after September 11, 2001, the most authoritative scholarly study on the subject concludes that "[t]he available data do * * * not support the conclusion that the [government has chosen] to resort to the privilege with greater frequency" or "in unprecedented substantive contexts." Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. 1249, 1301 (2007); see *id.* at 1315-1332 (charts identifying published state-secrets decisions by year). Moreover, even if there had been an increase in the government's invocation of the privilege, that might simply reflect an increase in litigation generally, or an increase in litigation challenging classified government programs in particular. *Id.* at 1301-1302.

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[6] Petitioners suggest (Pet. 20 & n.3) that a declassified military report indicates that the government in *Reynolds* previously "misuse[d]" the state-secrets privilege and misled the courts. Such allegations of intentional litigation abuse—which were previously asserted by an original *Reynolds* plaintiff and the heirs of other *Reynolds* plaintiffs—are without merit. See *Herring* v. *United States*, 424 F.3d 384, 387-388, 391-392 (3d Cir. 2005) (rejecting allegation based on the same report that the government's privilege assertion in *Reynolds* was untruthful), cert. denied, 547 U.S. 1123 (2006); see Gov't Br. in Opp. at 13-17, *Herring*, *supra* (No. 05-821) (responding to allegation that the government misled the Court in *Reynolds*); Gov't Response to Mot. for Leave to File a Pet. for a Writ of Error Coram Nobis at 19-24, *In re Herring*, 539 U.S. 940 (2003) (No. 02-M76) (explaining that this "allegation of fraud * * * is without merit").

In any event, the critical point is that the government asserts the state-secrets privilege when necessary to protect national security. The lower courts, like the court of appeals in this case, properly scrutinize those assertions through independent review. Petitioners provide no reason to question that the courts have properly discharged their dual duties to ensure that the government properly asserts the privilege only over matters "which, in the interest of national security, should not be divulged" and, when properly asserted, to prevent "forcing a disclosure of the very thing" protected or otherwise "jeopardiz[ing] the security which the privilege is meant to protect." *Reynolds*, 345 U.S. at 8, 10.

4. Finally, petitioners contend that this Court should grant certiorari in order to overrule or narrow the Court's holding in *Reynolds*. Pet. 34-38. That sweeping request is unfounded and should be denied.

In deciding whether to adhere to precedent, this Court considers the workability of the legal rule as well as "the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo* v. *Louisiana*, 129 S. Ct. 2079, 2088-2089 (2009). Here, the legal principles recognized in *Reynolds* date back to the earliest days of the Republic, see p. 11, *supra*, in this Court's decisions at least to *Totten* (1876), and they have been repeatedly affirmed in decisions since that time. The state-secrets privilege is a critical tool with which the Executive protects national security information from public disclosure—a need that is no less pressing today than it was when *Reynolds* was decided.

Petitioners argue (Pet. 35-36) that modern courts routinely consider classified and other sensitive information, under federal statutes providing for review in cer-

tain limited contexts and in cases adjudicating habeas corpus claims brought by detainees at the United States Naval Base Guantanamo Bay, Cuba. But none of the statutory provisions that petitioners cite has any application here; nor do petitioners identify any constitutionally protected right to litigate their civil claims against a private corporation for money damages akin to the constitutional right to habeas corpus review of detention at Guantanamo Bay. Petitioners' analogy to the procedures used in the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3, is particularly inapt. CIPA applies only in federal criminal cases, where the government always retains the power to dismiss the prosecution if it believes that disclosing information under CIPA would irreparably damage the national security. Cf. *Reynolds*, 345 U.S. at 12 (recognizing that rules governing treatment of classified information in criminal cases have "no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented").

The absence of any reason to revisit the Court's settled precedent in *Reynolds* is underscored by petitioners' proposed alternative (Pet. 37)—that when the government validly invokes the privilege to protect state secrets, courts should construe facts in favor of deprived litigants or "shift[] burdens against the government or [a private] defendant." Under the rule advanced by petitioners, a plaintiff could bring a suit against the government based on an alleged secret program, and the government would be required either to harm national security by disclosing state secrets or effectively to concede the suit (which could lead, among other things, to an injunction against the program). This result is untenable, and fundamentally out of step with more than a

century of this Court's state-secrets decisions. Moreover, petitioners' rule would, in this case, penalize the private defendant (Jeppesen) with a litigation sanction for the government's effort to protect national security. Petitioners provides no authority for that startling result.

Petitioners also suggest (Pet. 37) that courts could apply a balancing test that considers competing interests to the privileged information. But once a court has determined that military or state secrets are at stake, the government's interest in national security must be deemed paramount to the interests of private litigants in pursuing civil actions for money damages. See *Reynolds*, 345 U.S. at 11. Nothing since *Reynolds* warrants revisiting that conclusion.[7]

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[7] International Law Scholars and Human Rights Organizations contend (Amici Br. 4-23) that this Court should grant certiorari to consider whether international law forbids the application of the state-secrets privilege to dismiss petitioners' damages claims in this case. That contention was neither pressed nor passed upon below, is not presented in the petition for a writ of certiorari, and therefore does not warrant review. See *United States* v. *Williams*, 504 U.S. 36, 41-42 (1992). Nor should this petition be held pending the Court's decision in *General Dynamics Corp.* v. *United States*, Nos. 09-1298, 09-1302 (argued Jan. 18, 2011). Petitioners have not asked that their petition be held for *General Dynamics*, and they agree that *General Dynamics* presents questions distinct from the question presented here. See Pet. 34 n.9.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2011